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Brf. & Argument for Appellees.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

B. F. THOMPSON, *Appellant,*
vs.
D. M. FERRY, SIMON J. MURPHY AND CHARLES C. BOWEN, *Appellees.*

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF AND ARGUMENT FOR APPELLEES.

G. W. KRETZINGER,
SOLICITOR FOR APPELLEES.

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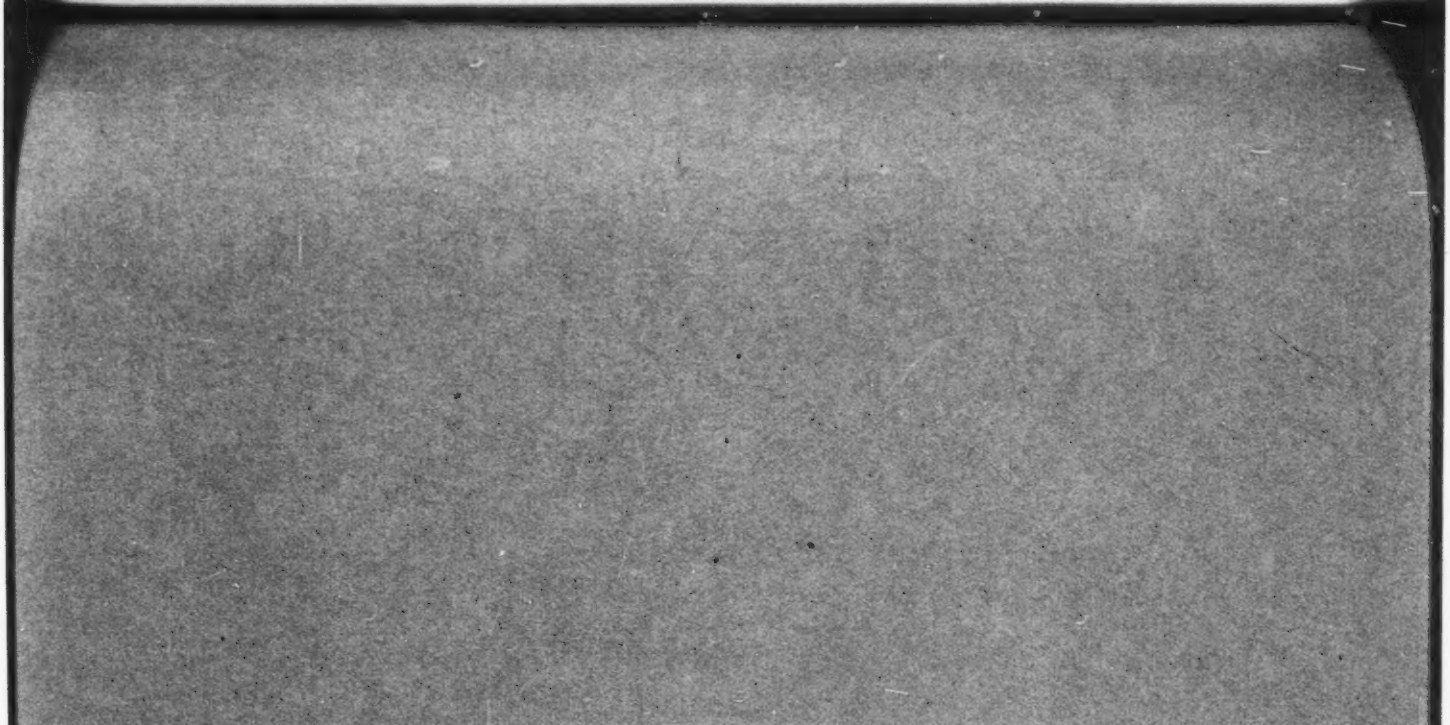

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BRIEF AND ARGUMENT FOR APPELLEES.

This suit was instituted October 6, 1896, in the District Court of the Fourth Judicial District of the Territory of Arizona, by appellant against appellees to quiet title in appellant to an undivided half interest in what is known as the Poland and Hamilton Mining Claims, situated in the Big Bug Mining District, in Yavapai County, Arizona.

The facts are: On October 5, 1883, M. E. Collins was the owner of an undivided one-half interest in the Poland Mining claim and one-half interest in the Hamilton Mining claim, both unpatented claims situated in the Big Bug Mining District.

On that day Collins executed a mortgage of all his right, title and interest in this property to John M. Roberts to secure the payment of a certain promissory note executed by him to Roberts. At that time Charles C. Lane and John Howell were the owners of the other one-

half interest, each owning an undivided one-fourth interest. On November 14, 1883, the mortgage still subsisting and of record, Lane conveyed his one-fourth interest to Collins, the mortgagor, and on the same day Collins attempted to convey by deed, that one-fourth interest to Robert Schofield.

On November 16, 1883, the mortgage still subsisting and of record, Howell conveyed his one-fourth interest to Collins, the mortgagor, and on August 16, 1884, Collins attempted to convey by deed an undivided one-fourth interest to Thompson, appellant. And afterwards and on July 23, 1896, Schofield attempted to convey to appellant the one-fourth interest conveyed to him by Collins.

On August 21, 1886, Roberts brought suit in the District Court of Arizona to foreclose the mortgage of October 12, 1883, wherein he alleged its execution and the failure of Collins to pay the note, and that Schofield and the appellant Thompson claimed some interest in the Hamilton and Poland Mining claims, which interests were subject to the lien of this mortgage, and prayed that such alleged interest of Schofield and Thompson be held subject to the lien of the mortgage, and that they be forever barred from the same, and for foreclosure of mortgage, etc.

Personal service was had upon Schofield, and service by publication and by copy of complaint under the Arizona statute was *had* on Collins and appellant.

The District Court in the foreclosure proceedings found as a fact that all defendants therein had been duly served with process; that the court had jurisdiction of the persons of the defendants and of the subject-matter, and

decreed that the mortgaged property be sold to satisfy the debt of Roberts; that the interest of Schofield and appellant had been acquired subsequent to the execution of the mortgage, and was subject to the lien thereof. (See Foreclosure Decree, Rec., 95.) Pursuant to the decree the entire Poland and Hamilton mining claims were sold at judicial sale to Roberts, who became the purchaser and received a sheriff's certificate of sale and afterwards a sheriff's deed of the property so sold.

Afterwards and on July 20, 1891, the administrator of the estate of Roberts conveyed the Poland and Hamilton mining claims to E. M. Dickey. After taking title as such grantee to both claims Dickey formally relocated the entire property in his own name and immediately entered into the unqualified, exclusive and adverse possession. Thereupon and on December 17, 1891, while thus in possession of both claims Dickey, pursuant to Section 2325 of the Revised Statute of the United States and the mining laws, applied to the registrar of the United States Land Office at Prescott, Arizona, for a patent to the mining claims, and such proceedings were then had that he was adjudged by the registrar to be the sole and exclusive owner of the Poland and Hamilton mining claims, and entitled to a patent to the entire property in his name. The patent issued.

Afterwards and on April 10, 1892, Dickey conveyed an undivided one-half interest in the mining claims to F. M. Murphy. Later, and on December 2, 1894, Dickey conveyed to Charles D. Arms the other undivided one-half interest. On July 2, 1894, F. M. Murphy conveyed his undivided one-half interest to D. M. Ferry, Simon J. Murphy and Charles C. Bowen, the present appellees, and on May 13, 1894, E. B. Gage (who on May 4, 1894, be-

came the grantee of the Arms one-half interest) conveyed an undivided one-half interest to Ferry, Bowen and Murphy, the appellees. And thus the appellees, by mesne conveyance for and upon valuable considerations, became vested with the legal title to the entire mining property in question.

Ten years after the decree of sale in the Roberts foreclosure case, nine years after the issuance of the sheriff's deed to Roberts, five years after the purchase of the entire property by Dickey, and two years after the legal title vested in appellees by the series of mesne conveyances, the appellant began this proceeding in the District Court of Arizona, claiming to be the owner of an undivided one-half interest in the mining claims, in virtue of the conveyance of the undivided one-fourth interest of August 16, 1884, and of the alleged one-fourth interest on July 23, 1896. The prayer of his complaint is that the court decree that his title to said alleged one-half interest be quieted and that it be adjudged that appellees have no right, title or interest in or to said undivided one-half said to belong to appellant.

The conduct of appellant, so far as the same is material to the case, from the year 1884 to the time of the institution of the suit, is summarized by the Supreme Court of Arizona, in its opinion (page 122 of record) as follows:

> "In 1884 and 1885 the then owner of the properties—Collins, Schofield and Thompson—placed a mill on one of the mines or on land adjacent thereto and commenced development work for the purpose of immediate revenues. The proposition was a flat failure. Collins abandoned the idea of pursuing his interests in the claims further and allowed foreclosure proceedings of his mortgage. He went

away and left Schofield and Thompson in the vicinity of the mines. Schofield moved the mill away, and nothing from that day until the present has been done or attempted to be done on the mines by way of annual expenditures, development work, or work for revenue by either Schofield or Thompson. They were aware of the mortgage foreclosure proceedings by Roberts, and neither of them paid any attention to the suit or to the allegation of Roberts' complaint against them that they claimed an interest in the mines, nor opposed his prayer that their interests be foreclosed. After the execution of the sheriff's deed, Roberts alone performed the annual expenditure upon the mines up until the time of his death, and neither Schofield nor Thompson made any efforts to do anything with the mines or give any expression of their interests in them."

After each of the transfers of title from Dickey, beginning in the year 1892, the successive grantees went into possession of the entire property and for a time operated the mines. Appellant permitted appellees to expend $30,000 in development work, and appellant was fully aware of the various transfers of title and of the expenditures of large sums of money to make the property valuable and profitable, yet for ten years he remained silent, asserting no claim or interest in the mines and taking no steps whatever to establish the alleged claim now set forth in his complaint.

Appellees made these defenses:

1. An estoppel of record by virtue of the foreclosure suit of Roberts *vs.* Collins, Schofield and appellant.

2. That whatever interest appellant or his grantor may have had, the same was canceled and annulled by issuance of a patent to Dickey after judgment of title in Dickey by the patent office.

3. That appellees were actual *bona fide* and innocent purchasers without notice, actual or constructive, of any claim, legal or equitable, of appellant.

4. That appellees and their grantor had been in peaceful and adverse possession of said mining claim under title, or color of title, since September 30, 1887, and the statute of limitations is a complete bar to appellant's claim.

5. That irrespective of the statute of limitations appellant is guilty of laches in equity, which bars the relief prayed for, by permitting the exclusive possession, development work and improvements during a period of ten years of all of which appellant and his grantor had both actual and constructive notice.

The District Court held that appellant was not entitled to the relief prayed and dismissed the bill. (See Opinion of District Court. Rec., 104 *et seq.*)

Upon appeal to the Supreme Court of the Territory this judgment was affirmed (Opinion Supreme Court. Rec., 117 *et seq.*) and appellant prosecutes this further appeal to this court.

I.

THIS COURT WILL ACCEPT THE FACTS AS FOUND BY THE SUPREME COURT OF ARIZONA IN ITS OPINION.

San Pedro v. *United States*, 146 U. S., 130.

II.

A TITLE ACQUIRED BY A MORTGAGOR AFTER THE EXECUTION OF A MORTGAGE INURES TO THE BENEFIT OF THE MORTGAGEE, AND IS SUBJECT TO FORECLOSURE. AND SUBSEQUENT PURCHASER FROM THE MORTGAGOR UNDER HIS AFTER-ACQUIRED TITLE STANDS IN NO BETTER POSITION THAN THE MORTGAGOR.

2nd Story Eq., 1201a.

1st Jones Mortgages, 679.

III.

THE DISTRICT COURT OF ARIZONA IN THE FORECLOSURE PROCEEDINGS INSTITUTED BY ROBERTS HAD JURISDICTION OF THE SUBJECT-MATTER AND FOUND AS A FACT THAT THE DEFENDANTS HAD BEEN SERVED WITH PROCESS. ANY ALLEGED CLAIM MADE BY THEM AS TO THE MINING PROPERTY WAS DETERMINED AND CUT OFF BY THAT DECREE. APPELLANT, A PARTY TO THAT CAUSE, CANNOT ATTACK THAT DECREE IN THIS COLLATERAL PROCEEDING.

Gunn v. *Plant*, 94 U. S., 664.

Grey v. *Brignardello*, 1 Wall., 627.

Kern v. *Strashburger*, 71 Ill., 303.

Pennington v. *Gibson*, 16 How., 74.

Hopkins v. *Lee*, 6 Wheat., 109.

McGoon v. *Scales*, 9 Wall., 23.

Lancaster v. *Wilson*, 27 Gratt., 624.

Jeter v. *Hewitt et al.*, 22 How., 264.

Barton v. *Anderson*, 4 N. E., 422.

Bundy v. *Cunningham*, 8 N. E., 176.

IV.

THE JUDGMENT OF THE REGISTER OF THE UNITED STATES LAND OFFICE, AND THE GRANT OF THE PATENT OF THE POLAND AND HAMILTON MINING CLAIMS TO E. M. DICKEY, GRANTOR OF APPELLEES, WAS JUDICIAL IN ITS EFFECT AND FOREVER TERMINATED THE ALLEGED INTEREST OF APPELLANT IN THE MINING PROPERTY.

Rev. Statutes, U. S., 2325.
Wright v. *Dubois*, 21 Fed., 694.
Steel v. *Smelting Co.*, 105 U. S., 447.
Johnson v. *Towsley*, 13 Wall., 72.

V.

ALL ADVERSE CLAIMS NOT INTERPOSED IN PROCEEDING FOR A PATENT BY REGISTRAR ARE, IN LAW, WAIVED, AND A PATENT IS A COMPLETE AND UNASSAILABLE CONVEYANCE OF THE LEGAL TITLE.

Starr v. *Starr*, 6 Wall., 418.
Silver Bow. Co. v. *Clarke*, 5 Pac., 570.
Paunheim v. *Dahl*, 9 Pac., 892.
Kannagh v. *Quartette Co.*, 27 Pac., 245.
Talbot v. *King*, 9 Pac., 434.
Smelting Co. v. *Kempt*, 104 U. S., 636.
Moore v. *Wilkinson*, 13 Cal., 478.
Hamilton v. *Mining Co.*, 33 Fed., 562.
Ferry v. *Street*, 11 Pac., 576.
Nor. Pac. Ry. Co. v. *Cannon*, 4 C. C. A., 303.

VI.

UNDER THE SHERIFF'S DEED ROBERTS WENT INTO POSSESSION OF THE ENTIRE MINING CLAIM. HIS POSSESSION WAS OPEN, ADVERSE AND HOSTILE. THEREFORE DICKEY, GRANTEE, WAS NOT A CO-TENANT WITH APPELLANT.

Unger v. *Mooney*, 63 Cal., 586.
Freeman on Co-Tenancy, Sec. 162.

VII.

EVEN IF DICKEY WAS A CO-TENANT, YET HIS APPLICATION FOR A PATENT AND THE ISSUANCE THEREOF TO HIM ADVERSE TO APPELLANT'S CLAIM, PUT AN END TO THAT RELATIONSHIP.

Tabor v. *Sullivan*, 12th Colo., 136.
Freeman on Co-Tenancy, Sec. 221.
Mining Co. v. *Mining Co.*, 3 Saw., 634.
Jackson v. *Huntington*, 5 Pet., 41.
Goeway v. *Urig*, 18 Ill., 238.
Hinkley v. *Greene*, 52 Ill., 223.
Ball v. *Palmer*, 31 Ill., 370.
Puckett v. *McDaniels*, 28 S. W., 360.
Frederick v. *Gray*, 10 S. & R., 182.
Van Gunden v. *G. V. & V.*, 52 Fed., 838.

VIII.

THE PATENT ISSUED TO DICKEY CANNOT BE ATTACKED COLLATERALLY; BUT ONLY BY DIRECT PROCEEDINGS INSTITUTED BY THE GOVERMENT OR PARTIES ACTING IN ITS NAME AND BY ITS AUTHORITY.

Lee v. *Johnson*, 116 U. S., 48.
Carter v. *Thompson*, 65 F. R., 329.
Poire v. *Wells*, 6 Colo., 406.
Green v. *Barker*, 66 N. W., 1032.

IX.

APPELLEES ARE BONA FIDE PURCHASERS, WITHOUT NOTICE, AND PURCHASED UPON A TITLE RECORD WHICH SHOWS THE TITLE IN DICKEY OF ALL THESE MINING CLAIMS AND THAT HE HAD RECEIVED THAT TITLE BY PATENT FROM THE UNITED STATES. THIS TITLE IS UNASSAILABLE.

Tiedman on Real Property, 817.

X.

APPELLANT IS BARRED BY THE FIVE YEARS STATUTE OF LIMITATIONS OF ARIZONA.

Revised Statutes of Arizona (1887), Title XLIV, Sec. 2299, p. 405.

XI.

INDEPENDENT OF THE STATUTE THE LACHES OF APPELLANT PRESENTS AN INSUPERABLE DEFENSE TO HIS CLAIM.

Galliher v. *Cadwall*, 145 U. S., 368.

Penn Mutual Life Ins. Co. v. *Austin*, 168 U. S., 685.

Speidel v. *Henrici*, 120 U. S., 377.

Hammond v. *Hopkins*, 143 U. S., 224.

Twin Leek Oil Co. v. *Marbury*, 91 U. S., 587.

Willard v. *Wood*, 164 U. S., 502.

ARGUMENT.

At the time we send this to the printer (December 15) we are advised by the clerk of this court that no brief has been filed herein for appellant; but we assume if any argument is made by his learned counsel it will be substantially the same as that addressed to the Supreme Court of Arizona.

I.

THE DECREE OF THE DISTRICT COURT OF ARIZONA OF DECEMBER 15TH, 1886, IN A CAUSE WHEREIN THE COURT HAD JURISDICTION OF SUBJECT-MATTER AND PARTIES, INCLUDING APPELLANT THOMPSON, A PARTY DEFENDANT, ADJUDGING THAT THE ALLEGED INTEREST OF THE APPELLANT IN THE MINING PROPERTY IN QUESTION WAS SUBJECT TO THE ROBERTS MORTGAGE, AND SHOULD BE FOREVER FORECLOSED BY SUCH DECREE, PRESENTS AN INSUPERABLE BAR TO THE PRESENT ATTEMPT OF THOMPSON IN THIS COLLATERAL SUIT TO RE-ESTABLISH THE CLAIM WHEREOF HE WAS IN SAID CAUSE JUDICIALLY DIVESTED.

As to Schofield and appellant Thompson, the complaint in the foreclosure suit expressly averred that "they claim some interest, by purchase or otherwise, in and to said mortgaged premises; that whatever of interest or claim they or either of them may have in or to said mortgaged premises was acquired by them and each of them after the making and recording of said mortgage, as aforesaid, and is subsequent and subject thereto."

The prayer of the complaint with reference to Schofield and Thompson was that the interest or claim of each

of them to said mortgaged premises be decreed subject to the mortgage, and that the defendant and each of them and all persons claiming under them or either of them, be barred and forever foreclosed "of all right, claim or equity of redemption in said premises."

Proper service was had on all defendants. Jurisdiction of the subject-matter and parties was unquestioned. All defendants made default, and on December 15, 1886, the District Court, after adjudging in favor of plaintiff Roberts and against the defendants Collins as to the debt, it decreed that the mortaged premises be duly sold. The District Court further found and decreed that the interests of Schofield and Thompson in the Poland and Hamilton mining claims were subsequent and subject to the mortgage, and that they should be "forever barred and foreclosed of and from all equity of redemption and claim in, of and to said mortgaged premises and every part thereof from and after the delivery of the sheriff's deed." The decree then describes the "mortgaged premises" as the two *entire* mining claims known as the Hamilton and Poland, and directs the sale of the entire property in satisfaction of the mortgage debt. Under that decree the entire property was sold, and, by deed of the sheriff, conveyed to Roberts.

No appeal was ever taken from the decree. It stands as a positive adjudication that on October 25, 1883, M. E. Collins was the owner of an undivided one-half interest in the Poland and Hamilton mining claims; that on that day he executed a mortgage of the property to John M. Roberts; that thereafter and during the life of the mortgage he acquired the other one-half interest which inured to the benefit of the mortgagee; that the interests which this suit seeks to establish were

the same one-half interest which Collins had subsequently acquired and which inured to the benefit of his mortgagee, and that they were subsequent and subject to the Roberts mortgage, and were forever barred and foreclosed by the proceedings and decree of the District Court of Arizona.

In this collateral proceeding the findings and adjudications in that decree must be accepted as final and conclusive.

Grey v. *Brignardello,* 1 Wall., 627, Bk. 17, Co-op., 697:

> "It is a well settled principle of law, that the decree or judgment of a court, which had jurisdiction of the person and subject-matter, is binding until reversed, and cannot be collaterally attacked. * * *
>
> It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale. With the errors of the court he has no concern. These principles have so often received the sanction of this court, that it would not have been necessary again to reaffirm them, had not the extent of the doctrine been questioned at the bar."

In *Pennington* v. *Gibson,* 16 How., 74, Book 14 Co-op., 851-2, the court said:

> "We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law, upon parties and their interests regularly within its cognizance. * * *
>
> Hence a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points decided between the parties to

such suit. In this there is and ought to be no difference between a verdict and judgment in a court at law and a decree of a court of equity. They both stand upon the same footing, and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation.' "

See also

McGoon v. *Scales*, 9 Wall., 23.
Black on Judgments, Sec. 245.
Lauearter v. *Wilson*, 27 Gralt., 624.
Jeter v. *Hewett*, 22 How., 264.
Cody v. *Hough*, 20 Ill., 43.
Kem v. *Strausberger*, 71 Ill., 303.

There is no doubt as to the jurisdiction of the District Court to make the findings and adjudications embraced in its decree. Defendant Schofield was personally served and Collins and Thompson were brought in by publication, pursuant to statute and by service of a copy of the complaint. Moreover, the District Court found as a fact and adjudged that all of the defendants were regularly served and that it had jurisdiction over them. This is conclusive in all collateral inquiries.

Black on Judgments, Sec. 274, and cases cited.

There is likewise no doubt as to the jurisdiction over the subject-matter. The suit was to foreclose a mortgage upon all the right, title and interest of Collins in the Poland and Hamilton mining claims. The determination of the extent and scope of that interest was directly presented to the court in the complaint, the allegation being

that the interest of Schofield and Thompson was subject to the mortgage, and the prayer was that their interest might be divested and barred by the decree. It was therefore proper and necessary for the court to determine whether such interests were prior or subsequent, within or without the mortgage; whether they were made at a time and under circumstances to be barred and determined by the decree; and the court found and adjudged that the interests of these defendants were subject to the mortgage and should be barred. The presumption is that all lawful evidence was heard justifying this finding and conclusion.

Again, it was a default decree.

In the case of *Barton* v. *Anderson*, 4 N. E. R., 422, which is peculiarly apt, because of the similarity of the facts in this case, the court said:

> "As applicable, however, to a suit to foreclose a mortgage, and other kindred suits in the nature of a proceeding *in rem*, where a party is made a defendant to answer as to his supposed or possible, but unknown and undefined interest in the property, we think that, as against him, a default ought to be construed as an admission that, at the time he failed to appear as required, he had *no* interest in the property in question, and hence as conclusive of any prior claim of interest or title adverse to the plaintiff. Any less rigid rule of construction might, and in many cases doubtless would, defeat the very object properly had in view in making the party a defendant to answer as to his supposed or possible interest in the property involved, to the end that all claims to or against such property might be adjusted by the final judgment or decree, and further litigation thereby avoided."

The decree of the District Court being *res adjudicata* upon every question therein litigated and determined, no court, in a collateral proceeding, is concerned with the

facts which pre-existed the decree. Appellees, when they purchased the property, were not required to look beyond its findings and adjudications. That decree being unreversed imports absolute verity, and in itself furnishes a sure foundation and defense to the title of appellees in the entire mining property in question.

II.

THE FACT THAT DICKEY RE-LOCATED THE ENTIRE CLAIMS IN HIS OWN NAME IN 1891, AND APPLIED TO THE REGISTRAR OF THE LAND DEPARTMENT AND OBTAINED A PATENT TO BOTH CLAIMS, IS CONCLUSIVE AGAINT APPELLANT'S INTEREST IN THIS SUIT. THE ACTION OF THE LAND DEPARTMENT IS QUASI JUDICIAL, AND IT HAVING ADJUDGED TITLE AND RIGHT TO PATENT IN DICKEY, THAT JUDGMENT IS FINAL.

Dickey asserting title in himself to both claims, took the necessary steps to entitle him to a patent, and the Land Department found that the facts entitled Dickey to such patent and granted the same to him.

This Honorable Court, in *Smelting Co.* v. *Kemp*, 104 U. S., 636, speaking as to the effect of the judgment of the officers of the Land Department in granting a patent, say:

> "Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to

> which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces."

That all adverse claims not interposed under the statute are, in law, waived, and that the patent is an unassailable conveyance of the legal title to the patent, see

Wright v. *DeBois*, 21 Fed., 894, 695, 696.
Stark v. *Starrs*, 6 Wall., 418.
Silver Bow Co. v. *Clarke*, 5 Pac., 570.
Raunheim v. *Dahl*, 9 Pac., 892.
Kannagh v. *Quartette Co.*, 27 Pac., 245.
Talbot v. *King*, 9 Pac., 434.
Moore v. *Wilkinson*, 13 Cal., 478.
Hamilton v. *Mining Co.*, 33 Fed., 562.
Ferry v. *Street*, 11 Pac., 576.
Nor. Pac. Ry. Co. v. *Cannon*, 4 C. C. A., 303.

But we assume that the learned counsel for appellant will invoke this doctrine:

> "It is well settled that co-tenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. A relaxation of this rule has been sometimes admitted in certain cases of tenants in common who claim under different conveyances and through different grantors."

And it is amply supported in

Brundy v. *Mayfield*, 38 Pac. Rep., 1070.
Hunt v. *Patchin*, 35 Fed. Rep., 816.

And by possibly the latest expression of this court on the subject in

Turney v. *Sawyer,* 150 U. S., 578.

But the facts which justify the application of this doctrine are not present in this record. Dickey at the time he applied for and obtained the patent was in no sense a co-tenant with appellant. No relation of trust and confidence incident to a co-tenancy existed between them.

When Thompson took his one-fourth interest in the property he became a co-tenant with Collins; but by foreclosure proceedings he was ousted and Roberts went into full ownership and absolute, exclusive, and adverse possession, of all of which appellant was chargeable with notice. All relation of co-tenancy then ceased. Dickey by purchase received title from Roberts' estate, and in July, 1891, acting as sole owner, entered into absolute, exclusive, adverse and hostile possession, made improvements, did assessment work, paid taxes, relocated, took initial steps to obtain patent and sold and conveyed part of the mining property to other purchasers. The foreclosure and sale by the sheriff of the whole claim dissolved relation of co-tenancy and disseized appellant and Schofield. Dickey, when he purchased did not become a co-tenant of either of them, and no trust attached to him as a purchaser.

Freeman on Co-tenancy, Sec. 162.

It is a clear rule of law, applicable alike to all real property, that a conveyance of a whole tract of land by one of several tenants in common, holding the tract, followed by adverse possession of the purchaser, amounts to an ouster or disseizin of the co-tenants.

Hinckley v. *Green,* 52 Ill., 230.

Tiedeman on Real Property, Sec. 251.

But assuming that Dickey was at one time a co-tenant with appellant, the various acts hereinbefore shown by him clearly indicating his adverse possession, with hostile intent, put an end to any relation of trust, and when Dickey applied for and obtained a patent he bore no such relation. The interests were then distinctly adverse, and being adverse it was appellant's duty to interpose and oppose the issuing of a patent to Dickey by the Registrar of the Land Office.

Tabor v. *Sullivan,* 12 Col., 136, 20 Pac., 437.
Mining Co. v. *Bullion Mining Co.,* 3 Saw., 634.

That the foreclosure proceedings, the sheriff's deed to the whole tract executed to Roberts, the entry into exclusive and adverse possession of the whole tract by Roberts, the transfer from the estate of Roberts to Dickey of the whole tract, the entry of Dickey into the exclusive and adverse possession, the operation by him of the mining property as sole owner, the relocation of the entire property by Dickey in his own name, and the other facts present in this record as conclusively found by the Supreme Court of Arizona, operated as a disseisin of the holders of the Thompson interest, if at any time a co-tenancy existed, and forever dissolved any relation of trust and confidence incident to a co-tenancy, and established the adverse character of the possession of Dickey at the time he applied for the patent so as to require the holders of the Thompson interest to adverse in the proceedings for the patent, or forever lose their rights, we refer this Honorable Court, in addition to the aforecited authorities, to the cases following:

Pluckett v. *McDaniel,* 28 S. W. Rep., 360.
Vangunden v. *C., V. & V.,* 52 Fed., 838.

Jackson v. *Huntington*, 5 Pet., 41.
Mining Co. v. *Mining Co.*, 3 Saw., 634.
Geowy v. *Urig*, 18 Ill., 238.
Fredericks v. *Gray*, 10 S. & R., 182.

For a full discussion of what constitutes disseisin and ouster in reference to co-tenants, see

Freeman on Co-tenancy, Secs. 221-2-3 and 228.

III.

But if the interest of appellant was not terminated by the foreclosure decree or patent, it is barred by the statute of limitations.

The Territorial statutes of limitation, so far as applicable, are as follows:

Par. (2297): "Every suit to be instituted to recover real property as against any person in peaceable and adverse possession thereof, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards."

Par. (2298): "By the term title is meant a regular chain of transfer from or under the sovereignty of the soil, and by color of title is meant a consecutive chain of transfer down to such person in possession without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing."

Par. (2299): "Every suit to be instituted to recover real property as against any person having peaceable and adverse possession thereof, cultivating, using or enjoying the same and paying taxes thereon, if any, and claim under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards."

The District Court of Arizona found that the claim of appellant was barred by the five years statute of limita-

tions, and in that conclusion the Supreme Court of the Territory concurred.

> "Courts of equity in general recognize and give effect to the statute of limitations as a defense to an equitable right, when at law it would have been properly pleaded as a bar to a legal right."
>
> *Moran* v. *Horsly*, 178 U. S., 214.

The trial court found as an ultimate fact that "defendants for five years before suit filed—October 6, 1896,—had been in open, notorious, exclusive, peaceable and adverse possession of both the Poland and Hamilton mining claims, and plaintiff was barred by the statute of limitations."

Touching this finding the Supreme Court of Arizona says, in its opinion (Rec., 122):

> "The assignments of error relate principally to the finding of the court upon the statute of limitations, in which we think the District Court was logically correct in its conclusions."

It is therefore an ultimate fact conclusively found in the case that appellees and their grantors were in the open, notorious, peaceable, exclusive and adverse possession of the mining property in question for over five years prior to the institution of this suit. That finding this court will not review.

San Pedro v. *U. S.*, 146 U. S., 130.

But if this Honorable Court should review the evidence, a brief reference to the pertinent facts will abundantly sustain the conclusion of the Supreme Court of Arizona. The Roberts mortgage was executed on October 25, 1883. The decree of foreclosure of that mortgage was rendered on December 15, 1886. In that decree the entire property

was sold to Roberts, and he duly received the deed of the sheriff of the entire property on September 30, 1887. On July 20, 1891, the administrator of the estate of Roberts conveyed the property to E. M. Dickey. On December 14, 1891, Dickey made a re-location of the mining claims in his own name. All this occurred five years before the institution of the present suit. It further appears in evidence (Rec., 122) that the present appellant, after an abortive attempt to operate the property abandoned it in the year 1885, and that since that time until the institution of the present suit appellant Thompson did nothing towards the operation of the property or for the assertion of any interest by him therein. Upon the execution of the Roberts deed to Dickey, Dickey immediately entered into the exclusive, adverse, open and notorious possession, publicly re-located the property in his own name and took the open and public proceedings to secure a patent to the entire property. The testimony clearly sustains the findings of the District Court confirmed by the Supreme Court of the Territory that the possession of the appellees and their grantors was so open, notorious, adverse and exclusive for five years prior to the institution of the suit that the bar of the statute of limitations operated to confirm their title against all persons forever.

The general rule as to whether a title of a co-tenant becomes adverse, is clearly stated in *Unger* v. *Mooney*, 63 Cal., 591, as follows:

> "Now, the possession of one tenant in common is the possession of his co-tenant. Such possession by one tenant has no element of hostility to the right of his co-tenant. The co-tenant out of possession is not informed by such possession that it has any adverse character. Such possession under claim of title adverse to the co-tenant, but not manifested to

him by the conduct of the possessor of a character to notify the co-tenant of its adverse nature, is not sufficient to set the statute of limitations in operation as between tenants in common. *The co-tenant must in some way be notified of the adverse holding, in order to be prejudiced by it.* This may be by actual notice, or by acts of declaration so open and notorious that it may be inferred that the co-tenant had knowledge of them. * * * The adverse character must in every case be manifested to the owner. The owner must be notified in some way that the possession is hostile to his claim or the statute does not operate on his right. * * * Hence, a notorious and open occupation with hostile intent is a necessary constituent of an adverse possession. Neither a hostile intent without such occupation, nor such occupation without hostile intent, is sufficient."

It is difficult to see what could have been done by Dickey to more clearly indicate that his possession was hostile and adverse, and equally difficult to see what steps could have been taken or proceedings had that more clearly and emphatically notified Thompson, the appellant, that the possession of Dickey was exclusive and adverse. Thompson knew of the foreclosure proceedings; he knew of the decree of sale of the entire property; he knew of the purchase of the entire property by Roberts and the issuance of the sheriff's deed; he knew of the adverse possession of Roberts and the expenditures made by him for assessment work; he knew of the sale by Roberts to Dickey, and the immediate entry by Dickey into open and exclusive possession. He is charged with the knowledge of the re-location of the property by Dickey in his own name. He was certainly notified that the possession of Dickey was exclusive and adverse, and with full knowledge of his supposed rights he waited for five years before seeking to re-establish his supposed interest in the mining property.

IV.

BUT ASIDE FROM THE STATUTE OF LIMITATIONS, THE SUPPOSED RIGHTS OF APPELLANT ARE BARRED BY HIS LACHES.

The Supreme Court of Arizona applied the doctrine of laches to the conduct of appellant, and concluded that he "is estopped from now asserting that he is a co-tenant, and that appellees are trustees of the title for his use." It is difficult to present a clearer case of laches than is presented by this record. And the law is clear that where mining property is the subject of controversy the duty of exercising diligence in the assertion of an equitable right is especially peremptory.

Johnson v. *Standard Mining Co.*, 148 U. S., 360.

Twin Lick Oil Company v. *Marbury*, 91 U. S., 587.

The facts convincingly showing that appellant was guilty of the grossest laches, are summarized in the opinion of the Supreme Court of Arizona, pages 122 and 123 of the Record. The appellant practically abandoned the property in 1885, and from 1885 to the time of the institution of this suit, over ten years later, he did nothing to assert his interests in the property. Silently and without any excuse he stood by and saw the Roberts mortgage foreclosed on the entire property, the deed of the sheriff to Roberts, the payment by Roberts for assessment work, the sale by the estate of Roberts to Dickey. He saw Dickey, supposing himself the sole owner, enter into exclusive possession, improving the property and re-locating it in his own name. He saw Dickey in the belief of

unquestioned ownership of the entire property, applying for and obtaining a United States patent. He knew that the patent was recorded, and on its face gave out to the world notice that Dickey was the sole owner. He stood by while Dickey sold to innocent purchasers for valuable considerations. He saw those innocent purchasers come into exclusive possession and improve and operate the property. He permitted appellees to expend $30,000 in improvement and development work. He permitted appellees to do tunnel work on the property to the extent of 2,000 feet. Yet, without any excuse, or pretense of justification, the appellant from 1886 to 1896 remained wholly silent as to any interest he may have believed he held in these mining properties.

In *Twin-Lick Oil Co.* v. *Marbury,* 91 U. S., 587, this Honorable Court speaks of the inequity of permitting a party who supposes himself to have a title in property of a fluctuating value, such as mining property, to stand by and see others invest in and improve the property, and then, after it has proved a success, step forth and assert his claim.

In *Evans* v. *Watson,* 156 U. S., 527, a case involving the application of the doctrine of laches, this court said:

> "Their delay of four years, during which much of the property has been sold, presumptively to parties who have purchased without notice, is fatal to their claim."

There is nothing in the claim, and especially nothing in the conduct of appellant that should induce this Honorable Court to relax in the slightest measure the salutary doctrine of laches, and there is much in the record to warrant the belief that appellant was wilful in his long inaction and silence, allowing appellees to improve and de-

velop the mines, intending to step forward and assert his interest when the property by their means and efforts was made a success.

Disregarding, then, the foreclosure decree, the patent to Dickey, and accrual of the statutory bar, I am confident that this Honorable Court is not at all likely to sanction such conduct on the part of appellant as this record discloses.

Respectfully submitted.

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Solicitor for Appellees.